HAVING REGARD TO ANY ONE AREA OF LAW YOU HAVE STUDIED, EVALUATE THE EFFICACY OF THE LAW AS A TOOL FOR CHANGE IN UGANDA.

aThis essay will concern with itself with developments in Family Law and in examining the efficacy of the law as a tool of change, I will examine how the Courts, by way of the influence of judicial activism,[1] multiple feminist and other activist organisations have tried to do away with colonial relic modalities of divorce, how it is acquired and given legal status by law. This has been through the tenuous and still viable fight to introduce a no fault based divorce regime in Uganda.

Divorce is not defined under any statutory framework that deals with regulating familial relationships in Uganda (namely the Divorce Act,[2] Marriage Act,[3] etc) Subsequently however, divorce has been understood as the dissolution of a valid marriage by a court of competent jurisdiction.[4] The Divorce Act had found its way in Uganda after the imposition of colonial laws upon the then Protectorate by the Order in Council of 1902.[5] As a result of that history, the Act heavily shared the religious biases of Victorian England which viewed marriage sacramentally and hence something that ought not be separated by the acts of men. This informed the construction of the Divorce Act which regulated how divorce (the only medium through which the marriage institution, held sacred by the institutions of the State could be terminated.) could be given. A divorce could be given after the parties proved grounds which Courts had to deem serious enough before granting a decree nissi.[6] Before the FIDA constitutional petition, the situation was such that women had to prove two grounds to get a divorce unlike men who had to prove one.[7]

[1] The phrase “judicial activism” is borrowed from Joe Oloka Onyango’s book: When Courts Do Politics: Public Interest Law and Litigation in East Africa (Cambridge, Cambridge Scholars Publishing, 2017)
[2] Cap 144.
[3] Cap 251
[4] Zahara Nampewo, Patricia Atim P’Odong, “Family & Succession Law in Uganda”(Netherlands, Kluwer Law International, 2020)
[5] Article 15(2) of the Order in Council
[6] Section 4 of the Divorce Act.
[7] Constitutional Petition No.2 of 2003

The judges found that this arrangement was discriminatory to women, in violation of the Constitution which had earlier been enacted in 1995 and was meant to herald a new, more just order in Uganda.[8] The Constitution was also very sensitive to the historical marginalization faced by women and set out to protect women's rights.[9] Uganda's jurisprudence, at least on paper, contains a liberatory streak as Uganda ratified - and is therefore beholden to – a number of International and regional pro human rights Conventions, that - for purposes of this essay's flow, these instruments are discussed only in as far as they relate to the place of women – sought to entrench the place of transformative legalism in Uganda. These included, but were not limited to, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), African Charter of Human and People's Rights and the African Charter of Human and People's Rights on the Rights of Women in Africa – also known as the Maputo Protocol.

This jurisprudence has however not developed without its own contradictions – born of the fact that law is a creature of society – and therefore carries may carry the implicit or explicit biases particular societal arrangements are wont to carry. Taking a Marxian frame of reference, which requires looking at Law as one of many superstructures used by the powerful classes to exercise control over more marginalized ones, Prof. Sylvia Tamale has argued that statutory frameworks that were used by colonial authorities – and now maintained by successive post-independence regimes – to regulate intimate lives of the natives always were wired by a patriarchal intent to control women's bodies (and labour) under an artificially constructed public/private dichotomy.[10] Such laws included prostitution laws, anti-homosexuality laws among a plethora of others, all which intended to set up a patriarchally inclined heteronormativity.

Such a background to a cursory examination of the law, at least before the new order brought in Uganda by the new Constitution, is enough to make more transparent why a Divorce Law, enacted in 1906, still has its inward logic intact after 120 years. Marriage, as a social institution, reproduces inherent capitalistic and patriarchal logics that feed of the public/private dichotomy reorganization of labour and maintained by the State's institutions which include the Law. (and its tentacles- Statutes, Courts etc) The potentially liberating power of a more just divorce regime is hence tied

[8] Article 21 of the Constitution of Uganda.
[9] Article 33 of the Constitution
[10] See more in Sylvia Tamale, "Decolonization and Afro-Feminism" (Canada, Daraja Press, 2017)

up in that structure and it explains more forcefully why even after Uganda's jurisprudence – as pertains marriage and divorce laws - tried to shake of its colonial shackles in 2004, no fault divorce still seems as too huge a step to succeed. Various efforts have however been sought on the legal front to liberate divorce laws to institute a no fault based regime. I will examine two; The Marriage Bill, 2024 and the Constitutional Petition of Innocent Ndiko & Ors v Attorney General.[11] Clause 74 of the Marriage Bill had sought to introduce a no fault based regime but this was sabotaged by highly influential religious groups and mostly male legislators who largely felt that this would "weaken the marriage institution." A more honest explanation would however be that this was one such instance where law was used to hollow out social change.

The Ngobi decision didn't fare any better. Justice Hellen Obura in striking out the petition was empathic in pointing out how her deliberations heavily considered the fact that Uganda was a heavily religious nation with various dogmas antithetical to divorce. She also chided the petitioners for trying to amend the Divorce Act judicially, rather than through the Parliament. The irony can't be lost on any judicious observer as the same Parliament which makes the law is very jaundiced against overturning the colonial era laws while the Constitutional Court offers a majoritarian impulse instead of confronting more honestly the law's oppressive history.

To cap this discussion, while we can acknowledge law's liberatory potential as regards marriage and divorce, it would be fallacious not to recognize the extra legal constraints (ideological and political) that shape the law to be an institution of oppression, not change – as regards no fault based divorce.

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